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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 1065

JAMES ROBERT KENNEDY, Petitioner,

v.

STATE OF WYOMING, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WYOMING

Gerald A. Peyton
Attorney at Law
United States Bureau of Land Management
320 First National Bank Building
Casper, Wyoming 82601

Raymond E. Thompson
Attorney for Petitioner
120 North Center
Casper, Wyoming 82601

November 18, 1970

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. _____

JAMES ROBERT KENNEDY, *Petitioner*,

v.

STATE OF WYOMING, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WYOMING

The petitioner, James Robert Kennedy, respectfully prays that a Writ of Certiorari issue to review judgment and opinion of the Supreme Court of the State of Wyoming entered in this proceeding on June 11, 1970.

OPINION BELOW

The opinion of the Supreme Court of the State of Wyoming, reported at 470 P.2d 372, rehearing denied 474 P.2d 372, appears in the Appendix hereto. The opinion of the companion case of *Carrillo v. State*, 474 P.2d 123, is also included in the index.

JURISDICTION

The judgment of the Supreme Court of the State of Wyoming was entered on June 11, 1970. A timely petition for rehearing was denied on September 9, 1970, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Whether instructing a jury in a criminal trial that the rule of presumption of innocence is "not intended to aid anyone who is in fact guilty to escape", so qualifies a defendant's right to a presumption of innocence throughout his trial that it in fact denies him any benefit of the presumption of innocence to which he is entitled.

STATUTORY PROVISIONS INVOLVED

Amendment V, United States Constitution, U.S.C. Vol. 1, p. XLIV:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The defendant was convicted in the District Court in the County of Natrona, State of Wyoming, on a charge of first degree rape. R. 28. His conviction rested solely upon the testimony of the complaining witness and no corroboration was given upon which the truthfulness of her testimony could be assessed. During the course of the trial, over the objection of defendant's

attorney, the following instruction was given to the jury: Instruction No. 6, "The rule which clothes every person accused of crime with the presumption of innocence, and imposes upon the State the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid anyone who is in fact guilty to escape, but is a humane provision of the law, intended insofar as human agencies can, to guard against the danger of any innocent person being unjustly punished. To establish the guilt of a defedant beyond a reasonable doubt is not meant that such guilt shall be established to absolute certainty. Absolute certainty in the establishment of any fact is rarely attainable, and never required in courts of justice". R. 28. Defendant's objection to this Instruction is indicated at page 384 in the record. Petitioner was subsequently found guilty and sentenced to a prison term of not less than 3 years, nor more than 8 years. R. 57. This finding was appealed to the Supreme Court of the State of Wyoming and affirmed on June 11, 1970. A Petition for Rehearing was denied on September 9, 1970. This same question was before the Wyoming Supreme Court in what may be regarded a companion case, *Carrillo v. State*, 474 P.2d 123. This case was decided on the same day that the petition for rehearing of the present case was denied and is referred to in the Court's opinion denying said petition. For this reason a copy of the judgment in the *Carrillo* case has been appended.

REASONS FOR GRANTING THE WRIT

THE ALLOWANCE OF THE INSTRUCTION QUALIFYING THE PRESUMPTION OF INNOCENCE DENIED PETITIONER THE DUE PROCESS OF LAW GUARANTEED TO HIM

BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner was tried in the District Court, Natrona County, Wyoming, on a charge of forcible rape, and the jury rendered a verdict of guilty. In the course of the trial, the following instruction was allowed by the Court over the objections of petitioner's attorney:

> The rule which clothes every person accused of crime with the presumption of innocence, and imposes upon the State the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid anyone who is in fact guilty to escape, but is a humane provision of the law, intended insofar as human agencies can, to guard against the danger of any innocent person being unjustly punished. To establish the guilt of a defendant beyond a reasonable doubt is not meant that such guilt shall be established to an absolute certainty. Absolute certainty in the establishment of any fact is rarely attainable, and never required in courts of justice.

It is petitioner's position that this instruction provided so much confusion to the jury and was such a denial of due process that it is reversible error in this instance.

A defendant's right to a presumption of innocence in criminal matters stems for the constitutional right to have the government prove criminal cases. The duty of the government in this regard is outlined in the case of *Speiser v. Randall*, 357 U.S. 513, 525-526, 78 S. Ct. 1332, 2 L. Ed.2d. 1460, (1958), where the Court stated "due process commands that no man shall lose his liberty unless the government has borne

the burden of producing the evidence and convincing the fact finder of his guilt." The same theory is indicated in *Deutch v. United States*, 367 U.S. 456, 471 81 S. Ct. 1587, 6 L. Ed.2d. 963, (1961), in the following: "One of the rightful boasts of Western civilization is that the [prosecution] has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. *Irvin v. Dowd*, 366 U.S. 717, 729. Among these is the presumption of the defendant's innocence, *Sinclair v. United States*, 279 U.S. 263, 296-297, *Flaxer v. United States*, 358 U.S. 147, 151". In the case of *Glover v. United States*, 147 F. 426, 431, where the lower court had attempted a qualification of the defendant's right to a presumption of innocence, the court said:

> The underlying vice in the foregoing charge of the court is in the assumption that in respect of the alibi the burden of proof "by a preponderance of evidence, that is, by the greater and superior evidence", shifted to the defendant. It loses sight of the fundamental rule in criminal procedure that the defendant is presumed to be innocent of the offense with which he is charged; that this is a continuing presumption which attends him like a guiding spirit throughout the ordeal of his trial, and imposes upon the prosecution the burden of overcoming such presumption by such weight of evidence as will satisfy the minds of the tryors beyond a reasonable doubt of the defendant's guilt.

Thus, it is important to preserve any right the defendant has to a presumption of innocence throughout his trial and the jury should be so instructed. The peti-

tioner, however, was actually denied any effect that an instruction on the presumption of innocence would have in his favor by reason of the qualification given in the instruction allowed by the court. In saying that the rule of presumption of innocence is not intended to aid anyone who is in fact guilty to escape, the court places the jury in the position of determining guilt or innocence before employment of the rule of presumption of innocence. This clearly calls for an inverted order of things such the presumption is to prevail throughout the trial until the actual guilty finding.

There is much law to the effect that the instruction used against the petitioner is improper and reversible error. The first case treating this problem is the case of *State v. Romeo et al.*, 128 P. 530, (Utah, 1912) where the State had tried to use an instruction almost identical to that used against petitioner. The State Supreme Court rejected this instruction in the following language at page 537:

> *Such a statement was neither* necessary nor befitting to the proper submission of the case. No good reason has been, nor do we think can be, given to support such a charge. It too much partakes of the court's belief of the accused's guilt, and of its fear of an acquittal, by the jury following and applying the law as to the presumption of innocence and burden of proof. Courts ought to stay out of the jury box, and should not undertake to do indirectly what they must know they cannot do directly. It is the duty of the court to give the jury the law and their duty to accept it as given them. The law is as stated by the Supreme Court of the United States in *Coffin v. United*

> *States*, 156 U.S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481, that the principle that there is a presumption of innocence in favor of the accused is the undoubted law axiomatic and elementary, and its enforcement lies at the administration of our criminal law.

Later in the case of *Gomila v. United States*, (5th Cir.), 146 F.2d. 372, an instruction on the presumption of innocence containing a similar qualification was rejected by the court. In the case of *Reynolds v. United States*, 238 F.2d. 460, (9th Cir., 1956), the District Court had instructed the jury that the presumption of innocence was a "humane provision of law, intended to guard against the conviction of an innocent person, but it is not intended to prevent the conviction of a person who is in fact guilty, or to aid the guilty to escape punishment". *Reynolds v. United States*, supra at 462. In rejecting this instruction, the Circuit Court said as follows at page 463:

> The inclusion of the qualification in question in an instruction on the presumption of innocence is designed to curb that calculated risk. It accomplishes this by implying that society is just as anxious to convict the guilty as it is to acquit the innocent. The implication is false, else there would be no presumption of innocence. It subverts the presumption, since it distracts attention from its paramount purpose of protecting the innocent. When this qualification is added to an instruction on the presumption of innocence, the result is to leave matters about where they would have been had no instruction on the presumption been given".

More emphasis on the importance of preserving a defendant's right to a presumption of innocence appears

in the case of *Stump v. Bennett*, 398 F.2d. 111, (8th Cir., 1968) in the following language describing the presumption of innocence: "It simply serves to regulate the complete burden of proof in a criminal trial, not only in going forward with the evidence, but more importantly in placing the burden of persuasion itself on the government."

It is clear that the government has attempted to shift some of its above-described burden to petitioner. The deprivation of petitioner's right to have this burden of proof remain in the government justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Wyoming Supreme Court.

Respectfully submitted,

GEORGE M. PORTER
540 First National Bank Building
Casper, Wyoming 82601

RAYMOND B. WHITAKER
150 North Center
Casper, Wyoming 82601

Counsel for Petitioner

APPENDIX

IN THE SUPREME COURT
STATE OF WYOMING

APRIL TERM, A.D. 1970
JUNE 10, 1970

JAMES ROBERT KENNEDY, Appellant (Defendant below),	)	
v.	)	No. 3795
STATE OF WYOMING, Appellee (Plaintiff below).	)	

Appeal from the District Court of Natrona County, Wyoming, the Honorable T. C. Daniels, Judge.
Raymond B. Whitaker, Casper, for appellant.

James E. Barrett, Attorney General of Wyoming, and Richard A. Stacy, Assistant Attorney General of Wyoming, Cheyenne, for appellee.

Before GRAY, C. J., and McINTYRE, PARKER, and McEWAN, J. J.

Mr. Justice McINTYRE delivered the opinion of the court.

James Robert Kennedy was charged and convicted of first degree rape in the district court of Natrona County. This opinion has to do with his appeal from such conviction.

In something of a shotgun approach counsel for appellant has assigned ten grounds for reversal. We have found no merit in any of them.

1. The first contention made for appellant is that there was no showing of force used by defendant. Such contention is not borne out by the record. The prosecutrix testified to being struck by defendant; to her resistance; that she was kicking and crying; and that bruises resulted from the prosecutrix being struck. Other witnesses told of complaints by the prosecutrix; of her clothes being torn; of seeing the bruises and injuries. One of the witnesses who described her injuries was a physician who examined the prosecutrix.

The defendant admitted having intercourse with the prosecutrix. Whether she offered resistance or consented was patently a jury question. State v. Bouldin, ... Mont. ....., 456 P.2d 830, 834.

2. Appellant claims the trial court erred because it did not grant defendant's omtion for directed verdict. This is said to be true because the prosecution did not establish the use of force and because it did not prove venue.

We have already pointed out that there was substantial evidence of the use of force and nothing more needs to be said on that subject. Regarding venue, the defendant himself fixed the place of the intercourse as being near the Casper airport and along a canal. A deputy sheriff testified the vicinity entirely within such county. Not only was there ample for the jury to find the act took place in Natrona County, but we can take judicial knowledge of the fact that any place in the vicinity of the Casper airport is within Natrona

County. Appellant does not claim the place where he had intercourse with the prosecutrix was in another county.

It is immaterial if part of the evidence we refer to as establishing the use of force and establishing venue may have been introduced after defendant's motion for directed verdict was denied. Neel v. State, Wyo., 452 P.2d 203, 204.

3. Appellant argues the trial court erred in refusing to grant defendant a new trial. The basis for the motion for new trial was that new evidence had been discovered. At the trial the prosecutrix stated she had not had any alcohol to drink. The "new evidence" claimed by defendant was evidence which might contradict this statement.

Appellant wholly fails to convince us that the matter of whether the complaining witness did or did not drink an intoxicating beverage is so material to defendant's guilt or innocence that a new trial would probably produce a different verdict. Indeed, appellant has not attempted to explain why he believes, if he does believe, that the statement made by the prosecutrix about not drinking had any bearing on the jury's verdict.

In Opie v. State, Wyo., 422 P.2d 84, 85, we reviewed four essential matters which need to be shown in connection with a motion for new trial on the ground of newly discovered evidence. Appellant has not demonstrated to us that those showings were made to the trial court.

4. Appellant complains because the trial court refused to instruct the jury that the charge against

defendant is one which is easily made and difficult to disprove; that the complaining witness and defendant usually are the only witnesses; and therefore the law requires that the jury examine the testimony of the prosecuting witness with caution.

Counsel for appellant relies primarily on People v. Williams, 55 Cal. App. 2d 696, 131 P.2d 851, 853, as authority for such a cautionary instruction. However, counsel refers to the *Williams* case as one similar to the instant case "where the testimony of the prosecutrix is not only uncorroborated, but is also highly subject to contradiction."

It is apparent from things we have already said that we do not agree the testimony of the prosecutrix was uncorroborated. It is true there were no eye witnesses who could be expected to corroborate all of the testimony of the complaining witness, but her testimony was corroborated by the testimony of the doctor and by witnesses who heard her complaints and saw her bruises and torn clothes—and also by defendant's admission that he had intercourse.

Aside from the defendant, who is appellant in our court, and the complaining witness, there were two male companions with this defendant. They were also charged with acts of rape. While they could hardly be expected to corroborate the victim's story, they were nevertheless eyewitnesses. Thus, this case is unlike those cases contemplated in the proffered instruction, where testimony on the part of the complaining witness is uncorroborated and where only the complaining witness and defendant are witnesses to the act.

The *Williams* case specifically recognized that whether a refusal to give a cautionary instruction is

prejudicial error depends upon the circumstances of each case. 131 P.2d 851. We find nothing in that case which would repudiate the earlier case of People v. Burnette, 39 Cal. App. 2d 215, 102 P.2d 799, 807. In the *Burnette* case, it was held the kind of cautionary instruction which Kennedy requested may be permissible where the act of intercourse is denied, and where there are no corroborating circumstances. However, where the act is admitted and the only issue is whether force was used, the cautionary instruction was said to have no place in the case.

Concerning the rule in our state, it was held in State v. Koch, 64 Wyo. 175, 189 P.2d 162, 168-169, not to be prejudicial error to refuse such an instruction as Kennedy requested, where testimony of the complaining witness is corroborated. It can be implied we think, from what was said in *Koch*, that when testimony of the prosecutrix is not corroborated a cautionary instruction should ordinarily be given, unless it appears the jury had a full realization of the duty to view the testimony of the prosecutrix with caution.

Also, mention was made in the *Koch* opinion of the fact that our court had previously stated, if the court instructs the jury that it may convict the defendant upon the uncorroborated testimony of the prosecutrix, it should give a cautionary instruction. In Kennedy's trial the court did not instruct that the defendant could be convicted upon uncorroborated testimony of the complaining witness. We assume such an instruction was not given because the trial court, like us, considered the testimony of the prosecutrix corroborated.

5. Appellant is claiming the trial court should have allowed the jury the option of finding the defendant guilty of adultery as an included offense in the crime of rape. No authority is cited for this novel contention. We will therefore assume no such authority was found by counsel for appellant. Our statute on adultery, § 6-86, W.S. 1957, applies to any person who "cohabits with another in a state of adultery." There was no evidence of a cohabitation in this case.

6. Appellant suggests the trial court erred because it refused to allow defendants' counsel to interrogate a juror who supposedly showed by her demeanor that she was not fully sure of her verdict. It would have been pure speculation and guesswork if the trial judge had tried to assume what the juror showed by her demeanor, and we have no way of knowing from the record what she showed by her demeanor.

Appellant cites no authority for his position on this point. On the contrary, he admits there is case law which would indicate denial of his request to interrogate was proper. We would have no basis for considering the denial prejudicial error.

7. Appellant claims error in the giving of instruction 6 which reads:

> "The rule which clothes every person accused of crime with the presumption of innocence, and imposes upon the State the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid anyone who is in fact guilty to escape, but is a humane provision of the law, intended insofar as human agencies can, to guard against the danger of any innocent person being unjustly punished. To establish the guilt of a defendant beyond

a reasonable doubt is not meant that such guilt shall be established to an absolute certainty. Absolute certainty in the establishment of any fact is rarely attainable, and never required in courts of justice."

Reynolds v. United States, 9 Cir., 238 F.2d 460, 462-463, is cited by appellant for the proposition that a defendant has a right to have an instruction on the presumption of innocence and that it is wrong to add a self-defeating qualification. We do not quarrel with the principle that it would be wrong to add a self-defeating qualification, but we cannot agree such a qualification was added in the instruction set out above.

In *Reynolds*, the jury had been instructed that the rule as to presumption of innocence is not intended to "prevent" the conviction of any person who is in fact guilty. The court pointed out that, where the prosecution is unable to muster evidence sufficient to overcome the presumption, conviction is *prevented*. Thus, it would be wrong to say the rule as to presumption of innocence is not intended to "prevent" the conviction of any person who is in fact guilty, because in some cases it may do that very thing.

Without saying whether we would follow *Reynolds* if we were called upon to consider the instruction dealt with in that case, we do point out that the instruction given in Kennedy's trial was different. The court merely said the rule which clothes every person accused of crime with the presumption of innocence is not intended to "aid" anyone who is in fact guilty to escape.

It is a correct and proper statement to say the rule we speak of was not developed "for the purpose of aiding the guilty to escape punishment." Indeed, this precise statement was made in the *Reynolds* case. 238 F.2d 463. It can be seen then that the trial court, in Kennedy's case, followed what was approved in *Reynolds*.

We find nothing in the instruction complained of which is not factually and legally correct. Perhaps we should mention that instruction 5 fully covered the matter of defendant being presumed to be innocent; and that this presumption accompanied him throughout the trial and went with the jury in their retirement and deliberation.

8. Appellant asserts an objection to instruction 8 which reads:

> "YOU ARE INSTRUCTED there is 'carnal knowledge' if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. It is not necessary that the vagina be entered; the entering of the vulva or labia is sufficient. Proof of emission is not required."

The objection to this instruction seems to be predicated on the idea that, since defendant admitted having had intercourse with the prosecutrix, it unduly prejudiced the minds of the jurors for the court to speak of penetration and of the sex organs. The only authority cited is 75 C.J.S. Rape § 82, p. 576.

This authority states, in a prosecution for rape, the court "must" properly charge as to the necessity for penetration, but an "abstract" instruction on the issue of penetration should not be given.

We have difficulty in understanding the objection to instruction 8 because appellant seems to say the instruction was "abstract," and yet he complains that it was so specific and complete as to prejudice the minds of the jury.

In any event, the defendant in this case was being tried for the crime of unlawfully and feloniously having had carnal knowledge of a woman forcibly and against her will. It was therefore necessary and proper for the court to define "carnal knowledge," and instruction 8 did that very thing. We find nothing wrong with the instruction, and appellant has shown no authority for condemning it.

9. Instruction 9 told the jury an act of sexual intercourse is against the female's will or without her consent when, for any cause, she is not in a position to exercise independent judgment about the matter. Appellant claims use of the language "for any cause" is too broad and all encompassing and undefined.

We find nothing objectionable in the use of these words; and appellant cites no authority or persuasive reason for believing use of such words prejudiced the defendant. We, of course, need not search out authorities but will presume counsel for appellant found none. Drummer v. State, Wyo., 366 P.2d 20, 22; Valerio v. State, Wyo., 429 P.2d 317, 319.

10. Finally, appellant argues the trial court defendant's admission that he had been previously convicted of a felony. The instruction stated such prior conviction could be considered by the jury in judging the credibility of defendant and for no other purpose. It also informed the jury that such conviction

did not raise a presumption that the defendant had testified falsely.

The only contention made in connection with this point is that the instruction was repetitious because, after defendant had testified on his own behalf, he was asked during cross-examination whether he had been convicted of a felony. There was no objection to the question, and defendant answered in the affirmative. Thereupon, the court immediately admonished the jury that it should not give any weight to the previous felony conviction in resolving the issue of guilt or innocence; that the jury could consider it in weighing the credibility of the witness' testimony; and that this was the only purpose for which the evidence was received.

It seems obvious to us the court was only zealous to see that the rights of defendant were fully protected by making it clear to the jury that a former conviction had no bearing in the case, except as it might affect the defendant's credibility.

Appellant has shown no prejudice from the fact that this instruction was included with other written instructions. On the contrary, we are inclined to believe harm might have resulted to defendant if the written instruction had not been given. Juries are usually instructed to consider all of the instructions as a whole, and it was proper for this one to be made a part of the whole.

It was permissible on cross-examination, after defendant had testified in his own behalf, to ask about prior convictions—if the purpose was to question the credibility of the witness. State v. Velsir, 61 Wyo. 476, 159 P.2d 371, 375-376, 161 A.L.R. 220. And instruc-

tions similar to the one criticized here have been previously approved by this court. State v. Hines, 79 Wyo. 65, 331 P.2d 605, 610-611, cert. den. 366 U.S. 972, 81 S. Ct. 1938, 6 L.Ed.2d 1261.

Finding no reversible error in connection with any of the assignments made, we approve the judgment of the district court.

Affirmed.

IN THE SUPREME COURT,
STATE OF WYOMING

APRIL TERM, A.D. 1970
SEPTEMBER 9, 1970

JAMES ROBERT KENNEDY, Appellant (Defendant below),	)	
v.	)	No. 3795
STATE OF WYOMING, Appellee (Plaintiff below).	)	

ON PETITION FOR REHEARING

Raymond B. Whitaker, Casper, in support of the petition.

Before GRAY, C. J., and McINTYRE, PARKER, and McEWAN, J. J.

PER CURIAM.

Defendant has petitioned this court for a rehearing in the above matter, asserting in some ten points that this court had either inadequately or erroneously disposed of his claims of error, including the disposition made of Instruction No. 6 on the presumption of innocence.

In the case of Carrillo v. The State of Wyoming, No. 3826, this day decided, we had occasion to reconsider the correctness of our holding herein that the instruction was factually and legally correct and there-

in concluded that the opinion in this case, which is reported in 470 P.2d 372, should be modified by eliminating therefrom the indication that Instruction No. 6 was approved in the case of Reynolds v. United States, 9 Cir., 238 F.2d 460. In keeping therewith the statement made in the second full paragraph on page 376 that "It can be seen then that the trial court, in Kennedy's case, followed what was approved in *Reynolds*" is withdrawn. The holding, however, is reaffirmed for the reasons also stated in Carrillo.

With respect to the remaining points raised in the petition for rehearing, the arguments thereon in final analysis are directed to claims of error which were fully argued, considered and adequately disposed of in the decision rendered. No additional facts or reasons are advanced in support of the petition on those particular points and accordingly the petition for rehearing must be denied, Elmer v. State, Wyo., 466 P.2d 375, 376.

Denied.

IN THE SUPREME COURT,
STATE OF WYOMING

APRIL TERM, A.D. 1970
SEPTEMBER 9, 1970

DANNY J. CARRILLO,

Appellant
(Defendant below),

v. No. 3826

STATE OF WYOMING,

Appellee
(Plaintiff below).

Appeal from the District Court of Natrona County, the Honorable R. M. Forrister, Judge.

Raymond B. Whitaker, Casper, for appellant.

James E. Barrett, Attorney General, and Donald L. Painter, Special Assistant Attorney General, Cheyenne, for appellee.

Before GRAY, C. J., and McINTYRE, PARKER, and McEWAN, J. J.

Mr. Chief Justice GRAY delivered the opinion of the court.

The defendant, Danny J. Carrillo, was found guilty by a jury of the crime of assault with a deadly weapon and sentenced to a term in the penitentiary of from four to six years. He appeals. In his brief he assigns as error four separate incidents occurring in the conduct of the trial, but in oral argument to the

court two of the points relied upon were waived and there is now before us the claim that the court erred (1) in giving Instruction No. 8 pertaining to the presumption of innocence, and (2) in refusing to grant plaintiff's motion for mistrial when a State's witness testified concerning prejudicial previous acts of the defendant against different people which had no relation to the crime charged.

By way of background, the record discloses that defendant's conviction grew out of an altercation on the evening of February 21, 1969, between the defendant, who was then 15 years of age, and Mike Genoff, of the same age, at the time Genoff accompanied by three young ladies was coming out of a theater. The defendant admits that he was the perpetrator and aggressor of the first encounter between the two when a few blows were struck; but as might be anticipated from the defendant's claim of self-defense, the testimony with respect to what happened shortly thereafter in an alley when defendant stabbed Genoff in the abdomen with a knife is most conflicting. There was, however, an abundance of substantial evidence to support the verdict of the jury.

Turning to the contention that the trial judge erred in giving Instruction No. 8, and keeping in mind our oft-repeated pronouncement that the instructions must be considered as a whole, it will be helpful to set out first Instruction No. 7, which also dealt with the presumption of innocence and was as follows:

> "YOU ARE INSTRUCTED that the defendant is presumed to be innocent of the crime charged against him until he is proven guilty beyond a reasonable doubt. This presump-

> tion of the defendant's innocence accompanies him throughout the trial and goes with the jury in their retirement and deliberation in the jury room, and the evidence must be examined in the light of such presumption, and it entitles the defendant to an acquittal unless it is overcome by such evidence as to satisfy the jury of the defendant's guilt beyond a reasonable doubt."

This was then immediately followed by Instruction No. 8, to which defendant excepted, reading as follows:

> "YOU ARE INSTRUCTED that the rule which clothes every person accused of crime with the presumption of innocence and imposes upon the State the burden of establishing his guilt beyond a reasonable doubt *is not intended to aid anyone who is in fact guilty to escape*, but is a humane provision of the law, intended insofar as human agencies can, to guard against the danger of an innocent person being unjustly punished. To establish the guilt of a defendant beyond a reasonable doubt is not meant that such guilt shall be established to an absolute certainty. Absolute certainty in the establishment of any fact is rarely attainable, and never required in courts of justice." (Emphasis supplied.)

It is the above-emphasized phrase upon which defendant levels his attack.

In this connection it should be noted that subsequent to the time that defendant's brief was filed in this case and prior to argument we had occasion, in the case of Kennedy v. State, Wyo., 470 P.2d 373, 375, to review an identical instruction and although recognizing that it would be improper "to add a self-defeat-

ing qualification" to an instruction on the presumption of innocence, we nevertheless held that this instruction when considered together with an instruction identical to Instruction No. 7 above was not subject to criticism in that respect and was not erroneous. In view of that decision, counsel for the defendant was in somewhat of a dilemma as to whether or not argument on the contention here was foreclosed.

In the discussion that ensued, however, it was pointed out that the mandate in Kennedy had not yet gone down and counsel was informed that we were not averse to giving further consideration to the question, particularly in view of a recent decision of the Colorado Supreme Court in Martinez v. People, Colo., 470 P.2d 26, wherein that court condemned—with one minor exception—the use of an identical phrase in an instruction. Thereupon the point was fully argued, is again before us, and we have given it full and careful consideration.

In Kennedy, which is still before us on a petition for rehearing, as well as here, the defendant relies heavily on the case of Reynolds v. United States, 9 Cir., 238 F.2d 460, and in addition of course upon the Colorado decision which was not available at the time of argument. Perhaps the first thing that needs to be done in this case is to reconsider the discussion in the Kennedy opinion, at page 376, wherein it was indicated that use of the phrase "for the purpose of aiding the guilty to escape punishment" as a part of an instruction on the presumption of innocence was approved in the Reynolds case. As therein reflected, the conclusion was drawn for the reason that the Reynolds opinion, at page 463, did contain on the presumption

of innocence and therein it was agreed that the rule was not developed for the purpose of aiding the guilty to escape punishment. However, what seems to have been overlooked was the more precise discussion that followed concerning the implication that could be drawn by a jury from the inclusion of that language in an instruction. In addition, it appears that any obscurity as to what the court in Reynolds intended to reach as an improper qualification of the rule was removed in the later case of Shaw v. United States, 9 Cir., 244 F.2d 930, 938. In that case the court again had before it the identical instruction given in Reynolds that ended with the clause "but it is not intended to prevent the conviction of any person who is in fact guilty *or to aid the guilty to escape punishment*" (emphasis supplied), and of this it was said, "This court has heretofore disapproved the last clause of this identical instruction here attacked," citing the Reynolds case. Consequently, confessing our shortcomings, we now retract any indication that the Kennedy instruction "followed what was approved in Reynolds" and recognize Reynolds as authority to the contrary.

That is not to say, however, that we now go into full retreat from our holding that the Kennedy instruction was factually and legally correct. There are two sides to this question. The view that the phrase under discussion is misleading and erroneously qualifies the presumption, which defendant's counsel describes as an "enlightened" view, recognizing that "the law is changing as times, customs and people change," of course finds support in the Ninth Circuit cases, supra; in the Fifth Circuit in the case of Gomila v. United States, 5 Cir., 146 F.2d 372; in the State of

Mississippi as reflected in Chinn v. State, Miss., 210 So. 2d 666; and in the Martinez case, supra. In addition, we call attention to the case of State v. Romeo, 42 Utah 46, 128 P. 530 (decided in 1912), wherein the Utah court in no uncertain terms castigated the use of the phrase in an instruction on the rule.

On the other hand, the view we took in Kennedy, which the State advances with much justification as the majority view, finds support in the Tenth Circuit in the case of Moffitt v. United States, 10 Cir. 154 F.2d 402, certiorari denied 328 U.S. 853, 66 S. Ct. 1343, 90L .Ed. 1625, in the Second Circuit in United States v. Farina, 2 Cir., 184 F.2d 18, certiorari denied 340 U.S.8 75, 71 S.Ct. 121, 95 L.Ed. 636, rehearing denied 341 U.S. 928, 71 S.Ct. 795, 95 L.Ed. 1359; in early Illinois cases such as People v. Lenhardt, 340 Ill. 538, 173 N.E. 155, reaffirmed in the recent case of People v. Dowling, 95 Ill. App.2d 223, 238 N.E.2d 131; in an early Kansas case, State v. Medley, 54 Kan. 627, 39 P. 227, reaffirmed in the recent case of State v. Barnes, 202 Kan. 21, 446 P.2d 774; in the Indiana case of Turner v. State, 102 Ind. 425, 1 N.E. 869; in the Idaho case of State v. Farnsworth, 51 Idaho 768, 10 P.2d 295; in the Montana case of State v. Hanlon, 38 Mont. 557, 100 P. 1035; and in the Nevada case of State v. Gee Jon, 46 Nev. 148, 211 P. 676, 30 A.L.R. 1443, rehearing denied 217 P. 587. And see 23A C.J.S. Criminal Law § 1221, p. 560, where it is said without qualification:

> "It is proper for the court to instruct the jury that the presumption of innocence is not intended to aid those actually guilty but to prevent an innocent person from being convicted."

It is apparent from the foregoing authorities that the divergent views of the courts with respect to the question before us are irreconcilable. Contrary to defendant's contention that there is an "enlightened" view or a modern trend to classify the phrase used in Instruction No. 8 as a "self-defeating qualification," we think the foregoing further demonstrates that there is no basis for such a contention. What we have are simply the plausible views of a great number of able jurists supporting both sides of the question. That, of course, makes difficult the decision we are impelled to render as a matter of first impression, such instruction not having been passed upon by this court prior to the Kennedy case despite the fact that it has for years been used as a standard instruction by the district courts.

One thing we note, however, and the one thing impressing us in the Kennedy case, was the lack of dissent to the view that the rule on presumption of innocence was *not* developed for the purpose of aiding the guilty to escape punishment. The conflict is whether or not it is proper so to advise the jury in an instruction. It was our initial impression that when a jury was fully instructed with respect to the rule, as it was here by Instruction No. 7 and by the same instruction in the Kennedy case, and instructed as to the meaning of "reasonable doubt," it was not improper or misleading by way of a further instruction to explain to the jury the purpose that the rule on the presumption of innocence was designed to accomplish. Even though we have again fully considered all of the reasoning and arguments underlying the divergent views, we remain unpersuaded that our holding in

Kennedy was incorrect in view of the abundance of authority supporting it, and as a consequence the contention here made with respect to use of the phrase under discussion in instruction No. 8 is rejected.

Defendant's second claim of error is based upon the testimony of the State's witness, Shirley Geist, then 15 years of age, given in response to a question by the prosecuting attorney on its case in chief as to how she had met the defendant. Her response was:

> "Well, I was in the lobby of the America theater, and the usher was talking to Danny [the defendant] and some of his friends, I assume, and people were throwing things inside the theater, and the usher was trying to find out who it was, and I was just joking around. First, Danny said, 'Well, I got hit with something on the head,' and I was joking around with him; and I said, 'Well, I did it.' And he told me to shut up or he'd knife me."

Preceding this incident Genoff had testified to a difficulty he had had with the defendant inside the theater on that same night, February 14, 1969, wherein defendant had said to Genoff, "Let's go to the alley and knife-fight." The prosecutor readily concedes that the question was preliminary to a line of questioning on the material issue of malice. The defendant, however, objected to the testimony on the ground that it was unrelated to that issue and constituted an attack upon the defendant's character, which was not then an issue.

The same contention is advanced here and in this connection we first point out that the answer was not elicited as the result of misconduct on the part of the

prosecutor inasmuch as the inclusion therein of the statement concerning defendant's admonition to the witness to "shut up or he'd knife me" was wholly voluntary. Even assuming that the statement was inadmissible, which is a broad assumption in the light of our holding in Valerio v. State, Wyo., 429 P.2d 317, 318, under somewhat similar circumstances, we are not persuaded that the error, if any, in the trial judge's ruling was prejudicial. Immediately following the conclusion of the witness's testimony the trial judge advised the jury that such statement was inadmissible but that he nevertheless was denying the motion for mistrial. This was immediately followed by an instruction given at defendant's request that such testimony was stricken and the jury was told to disregard it. That ruling, it seems to us, was most favorable to the defendant, and in view of the defendant's own admissions and the abundance of evidence to support the jury's finding on malice, which we mentioned above, we think the defendant was afforded all of the protection to which he was entitled under the circumstances.

Affirmed.

Mr. Justice McEWAN, concurring.

I concur in the result because I would make the use of Instruction No. 8 prospectively reversible error. The instruction is not a good statement of the law and I would condemn its future use.